United States Court of Appeals

for the Second Circuit

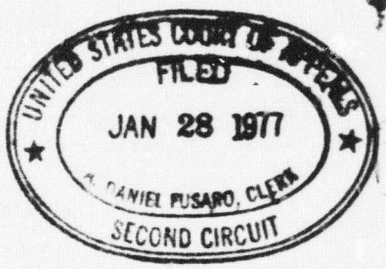
BRIEF FOR APPELLANT

76-7540

TO BE ARGUED BY
KENNETH HELLER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



Docket No. T-6665

76 Civil 3050

S. M. PIRES and VIRGINIA PIRES, his wife

Plaintiff-Appellant,

-against-

CHICAGO, ROCK ISLAND AND PACIFC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants-Appellees.

On Appeal From The United States District Court for the Southern District of N.Y.

BRIEF FOR PLAINTIFF-APPELLANT

KENNETH HELLER, ESQ.
Attorney for Plaintiff-Appellant
277 Broadway
New York, New York 10007
WO 2-6085

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-8469

76 Civil 3050

S. M. PIRES and VIRGINIA PIRES, his wife,

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CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants-Appellees.

On Appeal From The United States District Court for the Southern District of N.Y.

BRIEF OF S. M. PIRES and VIRGINIA PIRES, his wife PLAINTIFFS-APPELLANTS

STATEMENT

S. M. Pires and Virginia Pires, his wife, appeals from the memorandum decision of the District Court (Gagliardi, J.) dated October 18, 1976, and filed October 20, 1976, which granted defendant Frota Oceanica Brasileira's FRCP 11(b)(i) motion to dismiss and defendant

Chicago, Rock Island Railroad's 28 U.S.C. $1494 (a) motion to transfer the action to the United States District Court for the Southern District of Texas, Galveston Division.

FACTS

This is an action to recover money damages arising out of an accident that occurred on December 11, 1975, when the plaintiff, S. M. Pires, a 22-year old Brazilian seaman, was struck by a railroad car which backed up across a public thoroughfare, resulting in serious and permanent injuries to Mr. Pires, including the amputation of his right leg and serious mental repercussions to date. Mr. Pires, a native Brazilian and a seaman, had disembarked from his ship docked in Houston, and, under shipboard orders of his superior officer, took the particular street to town which intersected with an unmarked railroad crossing a short distance from the ship.

The history of the case is as follows:

On December 15, 1975, while plaintiff, who speaks, reads, and writes only Portuguese, still lay in the Galveston hospital, a member of the Galveston law firm of Royston, Rayzor, Cook & Vickery contacted and persuaded plaintiff, through their Spanish-speaking interpreter, to retain them. They attempted to settle the case for $80,000 by suing only the City of Galveston. This same

law firm represented the insurance company of defendant Frota Oceanica Brasileira and of the plaintiff, as well as having represented in the past the excess insurance carrier for the City of Galveston, creating a gross conflict of interest. Plaintiff refused to settle and left Texas for New York where he could receive competent professional, medical and psychiatric treatment. He discharged his Texas attorneys and tried to discontinue the action. A malpractice action is now pending in New York against the former law firm.

Plaintiff and his wife instituted an action in the Supreme Court of New York against defendant Chicago, Rock Island & Pacific R.R. Co. (Exhibit "B").

Chicago, Rock Island removed the action to the United States District Court for the Southern District of New York. While the motion was pending, the complaint was amended by plaintiff to add Frota Oceanica as a party defendant.

Chicago, Rock Island applied to the District Court for an order transferring the action to the District Court for the Southern District of Texas, Galveston Division, while Frota Oceanica applied to the District Court for an order dismissing the action or, alternatively, transferring the action to the Federal Court in Galveston.

Plaintiff opposed defendants' motions, filing a cross-motion to remand the case to the New York State

Supreme Court, or alternatively, to dismiss the action without prejudice.

Judge Gagliardi ruled in favor of Frota Oceanica's motion to dismiss as against it and Chicago Rock Island's motion to transfer. Plaintiff appeals this decision dated October 18, 1976, in all respects.

THE ISSUES PRESENTED

I Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Brasileira, S.A. on Grounds of Lack of Jurisdiction.

II Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Brasileira, S.A. by Ignoring Case Law Precedents.

III Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Since This Now Compels Maintenance of Multiple Actions.

IV Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Since Frota Oceanica Is Not "Present" in Texas.

V Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Because Its Dismissal and Reasons for Dismissal Are Contrary to Accepted Maritime Law.

VI Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Brasileira Based On the Cases It Cites in Support of Such Dismissal.

VII Court Below Erred in Transferring Plaintiffs' Case Against Chicago, Rock Island Railroad to Texas Because New York Is Plaintiffs' Free Choice of Forum, Which Must Be Given Paramount Consideration.

VIII Court Below Erred in Transferring Plaintiffs' Case Against Chicago, Rock Island Railroad To Texas Because Texas Is Forum Non Convenience.

IX Court Below Erred in Transferring Plaintiffs' Case Against Chicago, Rock Island Railroad To Texas Because No Weight Should Have Been Given to the Pending Action in Texas.

ARGUMENT

I. Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Brasileira, S.A. on Grounds of Lack of Jurisdiction.

a) Maritime Activity

Judge Gagliardi, in his decision, states:

> "...Arguably, the alleged tort of failure to instruct on a safe means of egress, having occurred on the defendant's ship, meets the locality requirement for jurisdiction. However, being hit by a railroad car while crossing freight tracks on the way to the City of Galveston has no significant relationship to maritime activity." (3)

While the Court accepted plaintiff's version of the occurrences in part, that the negligent order was given

on board the vessel, the Court overlooked the fact that it was plaintiff's superior who gave the order directing the specific route for the benefit of the vessel since plaintiff-seaman had to return to his vessel quickly. As plaintiff's affidavit states:

> "I was ordered by a superior officer on the ship to take 37th Street to town rather than any other street and this was why I was injured."

A dismissal of this action fails to take into consideration the traditional maritime activity in which plaintiff-seaman was engaged, i.e. shore leave.

b) Venue is Properly Laid in the Southern District of New York

The plaintiffs' right to choose the forum in which they wish to litigate is a heavily protected right which will not be disturbed unless the "balance of conveniences" weighs very strongly in favor of other persons. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Lykes Bros. Steamship Co. v. Sugarman, 272 F. 2d 679, 681 (2nd Cir. 1959); Baksay v. Rensellear Polytech Institute, 171 F. Supp. 1007, 1009 (S.D.N.Y. 1968); Foster v. United States Lines Company, 188 F. Supp. 389, 391 (S.D.N.Y. 1958).

The affidavit of RICHARD BETLESKY set out in detail all of the reasons that these indigent plaintiffs chose the Southern District of New York, namely: plaintiffs reside in New York, plaintiff S.M. Pires is under con-

tinuous medical, rehabilitation and psychiatric care in New York at the present time; plaintiffs' attorney practices in New York and they have no attorney in Texas; the vast majority of relevant medical and psychiatric witnesses reside and practice in New York; Pires has recurrent nightmares about the accident and has a dread of returning to the scene of his tragedy.

In Lykes Bros. Steamship Co. v. Sugarman, supra., the Court very cogently stated:

> "Our experience teaches that althouch vitally necessary it is often not easy for a seaman to obtain the counsel and medical support which he trusts; when he has obtained both it is not unnatural that he wishes to utilize them as fully as he can." (272 F. 2d at 681) (emphasis added).

To force this poor, young former seaman to return to Texas, engage an attorney to represent him, interrupt the medical care he is presently receiving and locate new medical, rehabilitative and psychiatric treatment would create irreparable harm.

II. Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Brasileira, S.A. by Ignoring Case Law Precedents.

It is clear that the lower court failed to consider the line of cases from this circuit, such as Kyriakos vs. Goulandris, 151 F. 2d 132 (1945) cited in plaintiffs' first Memorandum of Law and the cases which follow it, holding that a negligent act which begins on

vessel and culminates ashore is still with "maritime flavor," providing that the parties were engaged in "traditional maritime activities," as the case herein.

III Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Since This Now Compels Maintenance of Multiple Actions.

The dismissal of the action against defendant Frota, requires the maintenance of multiple actions. Since the action against Frota was dismissed the action against defendant, Rock Island, should have been dismissed; to keep one and dismiss another compels multiple actions in different courts.

Plaintiffs' original brief to the lower court in support of the motion to remand spells out the basis for dismissal on a lack of jurisdiction of both actions, or a remand to the State Court. The lower court chose to sever one action from another; this was in error. The action against Rock Island should have been dismissed for lack of jurisdiction since it was coupled with the action against Frota.

IV Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Because Its Dismissal Are Contrary to Accepted Maritime Law.

As explained under Point I,b), supra, Frota Oceanica and its agents are present and doing business in New York. They have no office or general agent in Texas.

Hoffman v. Blaski, 363 U.S. 335 (1960) cited by the Court holds that if the action could not originally have been commenced against defendant Frota Oceanica in Texas, it could not be transferred.

It is not in the interests of justice to deny plaintiffs their day in court against Frota Oceanica.

If the Federal Court decided to dismiss as against Frota Oceanica, it should also have dismissed against Rock Island to allow plaintiffs to have their day in state courts of New York.

V Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Because Its Dismissal and Reasons for Dismissal Are Contrary to Accepted Maritime Law.

If there is negligence on the part of an officer or a member of the crew, it makes no difference where the tort is finally consummated, so long as such negligence was in the course of employment. Hopson v. Texaxo, Inc., 383 U.S. 262 (1966).

In O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943) the Court, in holding that a seaman could recover under maritime law for a personal injury suffered ashore while in the course of his employment, stated:

> "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of employment' do not mean what they say or

> that they were intended to be restricted to injuries occurring on navigable waters."

See, too, Hopson v. Texaco, Inc., supra; Aquilar v. Standard Oil of New Jersey, 318 U.S. 724 (1942); Kyriakos v. Goulandris, 151 F. 2d 132 (1945); Marceau v. Great Lakes Transit Corp., 146 F. 2d 416 (1945), cert. den. 324 U.S. 872.

Under maritime law a seaman is in the service of his ship even though he is ashore, whenever he is on authorized leave from or is returning to his vessel, Aquilar v. Standard Oil of New Jersey, supra; Hamilton v. Marine Carriers Corp., 332 F. Supp. 223 (1971).

Mr. Pires, in the instant case, was a seaman and was on authorized leave from his ship at the time of his accident. Therefore, he was in the course of his employment. The fact that this accident inland or ashore does not remove the action from the aegis of accepted maritime law. This is plain from the cases cited above. So long as plaintiff can prove that his injuries were sustained through some negligent act on the part of officers, members of the crew, agents or employees of his employer then the employer can be held liable.

The negligent acts of Frota are not in issue on this appeal. The issue is rather that the dismissal of plaintiff's action against Frota before the trier of the facts has had an opportunity to evaluate plaintiff's claims is erroneous and contrary to accepted maritime law. The

fact that Frota's negligence resulted in personal injury to the plaintiff, inland, instead of on navigable waters, does not necessarily make it any less of a maritime action.

Therefore, the District Court erred in dismissing the action against Frota because it was not a maritime action or because there was no jurisdiction. There is jurisdiction in New York against Frota and the entire action should be tried in New York against all of the parties to determine plaintiffs' rights.

VI Court Below Erred in Dismissing Plaintiffs' Case Against Frota Oceanica Based on the Cases It Cites in Support of Such Dismissal.

To distinguish the cases cited by the lower court in support of its dismissal of defendant Frota on basis of jurisdiction, we only have to examine the facts of each case. Gowdy v. United States, 412 F. 2d 525 (6th Cir.), cert denied, 396 U.S. 960 (1960) is a fall from land on to land. Crosson v. Vance, 484 F. 2d 840 (4th Cir. 1973) is an injury occurring on navigable waters which failed the test of "Traditional Maritime activities."

VII Court Below Erred in Transferring Plaintiffs' Case Against Chicago, Rock Island Railroad to Texas Because New York is Plaintiffs' Free Choice of Forum, Which Must Be Given Paramount Consideration.

Plaintiff's right to choose the forum is entitled to the highest consideration, and it matters not that the

plaintiff is not a resident of that forum. In Goodman v. Southern Ry Co., 99 F. Supp. 852 (S.D.N.Y. 1951), Judge Kaufman laid down the following rule:

> "It has, however, definitely been settled in this district, that the balance of convenience must be strongly in favor of the defendant before the plaintiff's choice of forum will be disturbed. Ford Motor Co. v. Ryan, 2 Cir. 182 F. 2d 329. See Also Dolly Toy Co. v. Bancroft-Rellim Corp., 97 F. Supp. 531, decided by this Court in May, 1951; Perry v. Atchison, T & S.F. Ry Co., D.C.N.D. Cal., 82 F. Supp. 912; Skultety v. The Pennsylvania Railroad Co., D.C.S.D. N.Y., 91 F. Supp. 118. Judge Learned Hand, concurring in Ford Motor Co. v. Ryan, emphasized additionally the privilege granted the plaintiff in selecting a forum, and his decision to confirm the lower court's denial of the motion to transfer rested solely upon the weight he attached to this privilege." (99 F. Supp. at 854) (emphasis added).

VIII Court Below Erred in Transferring Plaintiffs' Case Against Chicago, Rock Island Railroad to Texas Because Texas is Forum Non Convenience.

Employees of the City of Galveston were 400 ft. from the site of the accident at the other of the train. The railroad yard was in complete darkness when plaintiff-seaman's accident occurred.

The only eye witness were the three Brazilian seamen presently employed on board vessels which call at East Coast U.S. ports and all over the world; not in Texas.

This jurisdiction is more convenient to all the eye witnesses than is Texas. In fact, as stated, one eye

witness crew member calls at East Coast ports every 30 days.

The Court thrice erred when it stated:

"...Majority of the witnesses are in Texas."

First, the individuals named by defendant and employed by the City of Galveston are not witnesses.

Second, the Brazilian crew members are not in Texas.

Thirdly, it is not the quantity of witnesses which matters, it is the quality and materiality of their testimony.

The burden is on the moving party to set forth the substance of the witnesses' testimony, and show how it is material to the action. This was not done by the moving party below. They have not demonstrated the substance of what information they wish to elicit from each witness named, nor have they demonstrated the materiality of the witnesses' testimony.

Proof of this type and nature is a prerequisite to a removal. Judge Kaufman of this court in Peyser v. General Motors Corporation, 158 F. Supp. 526, 529 (S.D.N.Y. 1958) stated:

> "Thus more is required of the movant than the mere assertion that it may call a designated number of witnesses at the trial. Of greater importance to a judge in determining a motion of this type is

> the materiality of the matter to which these witnesses will testify. National Tea Company v. The Marseille, D.C.S.D. N.Y. 1956, 142 F. Supp. 415, 416; Jenkins v. Wilson Freight Forwarding Co., D.C.S.D. N.Y. 1952, 104 F. Supp. 422, 424; Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., D.C.S.D.N.Y. 1949, 88 F. Supp. 863, 866."
>
> "The movant should endeavor to provide the court with a list of its principal witnesses and their locations, along with a brief statement of the matter to which it is anticipated they will be called upon totestify." (Emphasis added).

To the same effect is Chicago, Rock Island & Pacific R.R. Co. v. Hugh Breeding, Inc., 232 F. 2d 584, 588 (10th Cir. 1956); Strypek v. Schreyer, 118 F. Supp. 918, 919 (S.D.N.Y. 1954); Schmidt v. American Flyers Airline Corp., 260 F. Supp. 813, 814 (S.D.N.Y. 1966); Toti v. Plymouth Bus Company, 281 F. Supp. 897, 898 (S.D.N.Y. 1968); Development Co. of America v. Insurance Co. of No. America, 249 F. Supp. 117, 118 (D. Md. 1966) and Carter v. United States Lines Company, 200 F. Supp. 707, 708 (S.D.N.Y. 1961).

Within our heading above, we must direct the Court's attention to the fact that the site of the accident occurring in Galveston should hae no bearing upon the choice of the forum. The fact that the site of the injury itself is a factor of no consequence. Cooper v. Valley Line Company, 320 F. Supp. 483, 485 (W.D. Pa. 1970) ("The occurrence of the accident at McMehen, West Virginia,

presents no compelling reason to transfer in the circumstances of this case."; Oltman v. Currie, 231 F. Supp. 654, 655 (E.D.S.C. 1964); Bush v. United Air Lines, 148 F. Supp. 104, 105 (S.D.N.Y. 1956) (" The fortuitous circumstances that this accident occurred through collision with a mountain in Wyoming should not operate to deprive the plaintiff of her choice of forum.").

The convenience of counsel to the jurisdiction, especially a counsel upon whom a foreign seaman, not speaking the English language, can rely is of most importance in deciding the forum. In our matter, we must keep in mind that plaintiff-seaman finally discharged his original counsel because plaintiff realized that he was merely being used to enhance a business relationship with the vessel's insurer so as to guarantee further business to this firm of lawyers; that situation does not exist at this time.

Many other courts have also considered the residence and convenience of expert witnesses and counsel to be of high significance: Altman v. Deramus, 342 F. Supp. 72, 76 (S.D.N.Y. 1972); Foster v. United States Lines Company, 188 F. Supp. 389, 391 (S.D.N.Y. 1958); Robbins Music Corp. v. Alamo Music, 119 F. Supp. 29, 30 (S.D.N.Y. 1954); Cooper v. Valley Line Company, 320 F. Supp. 483, 485 (W.D. Pa. 1970); Legg v. Pittsburgh & Lake Erie Co., 186 F. Supp. 73, 74 (W.D. Pa. 1960); Standard v. Stoll Packing Corporation, 210 F. Supp. 749, 750 (M.D. Pa. 1962), appeal

dismissed, 315 F. 2d 626 (3rd Cir. 1963); Davis v. American Viscose Corporation, 159 F. Supp. 218, 220 (W.D. Pa. 1958).

With regard to the convenience of the transfer of forum insofar as medical experts and medical records are concerned:

In Galveston, the medical treatment rendered was merely corrective. It corrected the traumatic amputation; this can be presented by the printed page.

On the other side of the coin, we have plaintiff receiving rehabilitation treatment here with the preparation for him to receive the latest prosthetic device, invented by the Rusk Rehabilitation Institute. Testimony to elicit plaintiff's response, or lack of response, to that treatment cannot be presented on a printed page. To deprive plaintiff-seaman of the testimony of his rehabilitation doctor, Dr. Dong Sun Chu, from the Rusk Institute will sorely inconvenience him.

We are well aware of the fact that with every severe trauma we may well have a psychic trauma and, in our case, plaintiff exhibits, among other sequelae, an enormous phobia against returning to the City of his trauma, Galveston. He is undergoing treatment here in New York and Dr. Savitsky, his physician, resides here. Again, to transfer will deprive him of the testimony of a second expert witness.

Plaintiff has previously cited a sequence of cases which pertain to the weight to be given to the presence of expert witnesses in this forum as a countervailing argument to transfer. Plaintiff will not repeat them; t hey are present on Pages 7 & 8, commencing with Altman v. Deramus, supra.

At this point, under this argument, we must now point out the effect upon the plaintiff-seaman of the transfer of forum as against the effect on Defendant, Rock Island.

In order to effectively understand what a transfer would mean to plaintiff-seaman as against defendant Rock Island, we must consider the following:

Pires does not speak English, not one word.

Pires is totally indigent. He is being supported by maintenance and cure paid to him while he is being rehabilitated in New York.

Pires cannot care for himself. He needs to be in a hospital, or be taken care of by his wife.

Pires is being rehabilitated here, not in Texas. For him to travel, he will lose what he has gained here and what he is looking forward to receive, a modern artificial prosthetic device which will allow him to walk.

Pires is suffering from severe phobia. In view of Dr. Savitsky's report, the only way he will go to

Texas is under extreme sedation which will effectively destroy his initiative and reduce him to the level of an incomprehensible child.

Pires' wife and infant child, 11 months old, reside in an apartment in New York.

Pires' child has sustained a fractured hip and pelvis and is still in body cast.

How can we balance this as against one day's inconvenience to take the testimony of whatever witnesses defendant Rock Island wished to produce in Texas by way of deposition.

Court below erred in failing to properly balance the convenience of the removal between the parties.

IX Court Below Erred in Transferring Plaintiffs' Case Against Chicago,Rock Island Railroad to Texas Because No Weight Should Have Been Given to the Pending Action in Texas.

Plaintiff's free choice of residence and forum was not Galveston but is the City of New York and the courts of New York.

The action was commenced in Galveston not because plaintiff was given any alternative choice; it was because he did not freely choose or contract his attorney.

The manner as outlined in plaintiff-seaman's

affidavits ( ) and as set forth in my affidavit ( ), deprived plaintiff-seaman of a free choice of attorneys and, consequently, of forum.

Plaintiff, as a seaman, is admittedly a "Ward of Admiralty," but in view of the circumstances here, there is even a greater burden upon this court to scrutinize every transaction plaintiff has made and the contingency agreements he made between himself and his former attorneys ( ) and the circumstances surrounding these agreements are such as to show to this court that plaintiff was deprived of his free choice of attornys and of forum. Had this plaintiff-seaman been an American seaman, English speaking, with long sea experience and prior history of claims, etc., even then under those circumstances this Court is duty bound to examine any contract he made with greatest care.

Here we have a Brazilian seaman, suffering a severe trauma, 22 years of age, less than one year at sea, never having been in Port of Galveston, friendless, was ordered by the Master of his vessel to comply with a request made to him by this attorney, Mr. Bunce. This contract and its subsequent results are entitled to the greatest and most careful examination as to all aspects. See Garrett v. Moore McCormack Lines, 317 U.S. 239, which quoted the opinion of Justice Story in Harden v. Gordon F. Case No.6047 (CC Me 1823):

> "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending toward them a peculiar protecting favor and guardianship. They are emphatically the wards of admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians and cestuis que trust with trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over then; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transactions, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable."

The wardship Theory for seamen was still applicable and cited in Blanco v. Pheonix Co. de Navegacion, 304 F. 2d 13 (1962), and Flener v. Waterways Oil Co. 261 F. Supp. 740 (1966).

In view of the fact that the lower court relied heavily in its opinion on the existence of another action against another defendant when it said:

> "There is strong policy favoring litigation of related claims in the same tribunal."

Plaintiff did not freely choose that tribunal, or that forum -- it was chosen for him, as were the attorneys chosen for him. This forum is clearly one of his own choosing and it is his decision to remain in this forum, in view of the circumstances surrounding his contracting with attorneys who chose the forum to suit not the convenience of the plaintiff, but to suit their major clients.

This court has the opportunity to right a wrong committed against an indigent, unsophisticated, foreign seaman, who suffered one of the most severe injuries a man can suffer, the loss of a major portion of his body.

Transferring this action based upon the existence of the other action not freely brought would most certainly be inimical to the interests of a seaman and in derrogation of Garrett v. Moore McCormack Lines, supra, and cases that follow its holding.

CONCLUSION

For all the foregoing reasons the judgment should be reversed as to defendants, and trial commenced, or the case should be remanded to Supreme Court of New York, New York County.

Respectfully submitted,

Kenneth Heller

Attorney for Plaintiffs-Appellants

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SUSAN HARMON, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 277 Broadway, New York, New York 10007.

On 28 January, 1977, deponent served two briefs and one appendix upon Victor Cichanowicz, Esq., attorney of record for defendant-appellee Frota Oceanica Brasileira, S.A., at 80 Broad Street, New York, New York, by delivering true copies to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorney therein.

Susan I Harmon
SUSAN HARMON

Sworn to before me
on 28 January 1977

RICHARD BETLESKY

RICHARD BETLESKY
Notary Public, State of New York
No. 30-6124
Qualified in New York County
Commission Expires March 30, 1978

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH HELLER, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 277 Broadway, New York, New York, 10007.

On 28 January, 1977, deponent served two briefs and one appendix upon Henry Herbert, Esq., attorney of record for defendant-appellee Chicago, Rock Island & Pacific R.R. Co., at 466 Lexington Avenue, New York, New York by delivering true copies to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorney therein.

KENNETH HELLER

Sworn to before me
on 28 January, 1977

SUSAN HARMON
SUSAN M. SMITH
Notary Public, State of New York
No. 31-3744590
Qualified in New York County
Commission Expires March 30, 19....